KOH KIM CHAI v. ASIA COMMERCIAL BANKING COPORATION LIMITED

[P.C. (Lord Fraser of Tullybelton, Lord Edmund-Davies, Lord Scarman, Lord Bridge of Harwich and Sir Denys Buckley) February 20 & March 12, 1984]

[Privy Council Appeal Nos. 49, 50 and 51 of 1981]

Banking – Banking business – Whether foreign bank obtaining a charge on land as security for loan and in attempting to enforce the charge was transacting banking business in Malaysia – Banking Act, 1973, s. 3(1).

Contract – Overdraft facilities given by bank in Singapore – Charges of land in Malaysia – Whether application can be made for sale of land – Whether agreement unlawful – Exchange Control Act, 1953, s. 3(1) – Contracts Act, 1950, s. 24.

The respondent was a bank registered and carrying on business in Singapore. The appellant charged his land in Malaysia as security for advances on current account made by the respondent to a company in Singapore. Subsequently the appellant executed two further charges on the land in favour of the respondent as security for advances by the respondent to two other companies registered in Malaysia. The respondent required payment of the principal and interest on the charge. No payment was made and the respondent applied to the court for an order of sale of the land by public action. An order was made in the High Court and the appellant's appeal to the Federal Court was dismissed – See [1981] 1 M.L.J. 196. The appellant appealed from the decision of the Federal Court. Two main issues were raised on the appeal. They are whether the respondent, in obtaining a charge on land situated in Malaysia as security for a loan and in attempting to enforce the charge was (1) transacting banking business within the meaning of section 2 of the Banking Act, 1973 contrary to section 3(1) of that Act and/or (2) acting in contravention of section 9 (1) of the Exchange Control Act, 1953. If, in consequence of either of these questions being answered in favour of the appellant, the charge is illegal, the further question arose what relief if any, the appellant was entitled to receive.

Held: (1) the expression "making advances to customers" in section 2 of the Banking Act cannot include the taking of security from third parties. The customer in this case was the borrower company and the appellant was merely a guarantor. Even if it were held that the security was taken in Malaysia, that was not contrary to section 3(1) of the Act;

(2) the security in this case was not taken in Malaysia. The registration of the charge in order to make it enforceable cannot be considered as part of the transaction of making an advance to a customer. Consequently no part of the transaction was carried on in Malaysia. The loan was made in Singapore and the proper law applicable was that of Singapore;

(3) the business of making advances to customers cannot by any reasonable process of interpretation be held to include enforcing the security against a guarantor;

(4) there was no evidence in this case that if the security was enforced the respondent would seek to obtain any payment outside Malaysia and therefore there was no evidence that the respondent would be acting in contravention of the Exchange Control Act, 1953;

(5) If the charge was illegal on either of the grounds adduced, the appellant was more to blame for that than the respondent. Even if it be assumed that the parties were equally to blame, the appellant was at least entitled (contrary to the view of the learned trial judge) to a declaration that the charge was illegal, void and unenforceable.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Allan Heyman Q.C. (*W.R. Steward-Smith* with him) for the appellant.

R. Alexander Q.C. (*N. Chambers* and *Miss Ai Huah Chuah* with him) for the respondent.

Cur. Adv. Vult.

Lord Fraser of Tullybelton (delivering the judgment of the Board): This appeal raises two main issues. They are whether the respondent, in obtaining a charge on land situated in Malaysia as security for a loan, and in attempting to enforce the charge, was (1) transacting banking business within the meaning of section 2 of the (Malaysian) Banking Act 1973, contrary to section 3(1) of that Act and/or (2) acting in contravention of section 9(1) of the (Malaysian) Exchange Control Act 1953. If, in consequence of either of these questions being answered in favour of the appellant, the charge is illegal a further question will arise as to what relief, if any, the appellant is entitled to receive.

The respondent is a bank registered in Singapore and carrying on business there. The appellant is the registered proprietor of land in Malaysia, namely the land comprised in grant 23940, lot 2605, in the Mukim of Senai-Kulai ("the land") containing approximately 53 acres. By a charge dated May 22, 1973 the appellant charged the land as security for advances on current account made, and to be made, by the respondent to Overseas Lumber Private Ltd., a corporation registered in Singapore, up to a limit of a principal sum of $350,000. with interest thereon. The charge was executed in Singapore. Thereafter it was registered in Malaysia.

Also on May 22, 1973 the appellant executed two other charges on the land in favour of the respondent, as security for advances by the respondent to two other companies. These companies were both registered in Malaysia, but it has not been suggested that that fact has any relevance to

the issues raised in this appeal. The Federal Court ordered that the decision in this appeal should be binding in the consolidated appeals concerning the two other companies. Their Lordships will refer hereafter only to the facts of this appeal.

In terms of the charge the appellant bound himself to repay the amount owing to the respondent upon demand in writing. By notice dated August 22, 1976 in the appropriate form under the National Land Code, the respondent required payment of the principal sum of $350,000. with interest, the total sum of principal and interest amounting to $420,328.63 on January 9, 1975. No payment was made by the appellant. The respondent then applied to the Court in Malaysia for an order for sale of the land by public auction. After sundry procedure Syed Othman J. by order dated December 28, 1978 ordered that the land be sold by public auction. The appellant appealed against that order but the Federal Court (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. and Abdul Hamid J.) dismissed the appeal.

When the matter was before Syed Othman J. the application for an order was resisted by the present appellant on several grounds which are no longer insisted upon and which need not now be considered. The first contention which he now puts forward is to the effect that the charge is illegal and void on the ground that its creation and the attempt to enforce it were contrary to section 3 of the Banking Act 1973. Sections 2 and 3 of that Act, so far as immediately relevant, provide as follows: –

"2. In this Act unless the context otherwise requires –

'bank' means any person who carries on banking business;
'banking business' means the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers and includes such other business as the Central Bank, with the approval of the Minister may prescribe for the purposes of this Act; ...

[Their Lordships understand that no other business relevant to this appeal has been prescribed by the Central Bank].

3(1) Banking business shall not be transacted in the Federation except by a corporation which is in the possession of a licence in writing from the Minister authorising it to do so.

...

(5) Any person who contravenes the provisions of this section shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

Counsel for the appellant relied on the words "making advances to customers" in the definition of banking business in section 2. He submitted that they included the taking of security in support of an advance. Taking such security was an integral part of making an advance. The making of the advance and the taking of security in support of it were all one transaction. The respondent, by carrying out part of the transaction in Malaysia, had transacted banking business there, and, as it was not in possession of a licence from the Minister authorising it to do so, it had contravened section 3(1) of the Act.

Their Lordships are unable to accept that submission. In the first place they do not consider that the expression "making advances to customers" in section 2 is capable of including the taking of security from third parties. The customer in this case was the borrower company. The appellant was merely a guarantor; the Federal Court stated that he was not a customer of the bank, and that statement has not been challenged before this Board, although their Lordships are not aware of any evidence on which it could be based. Accordingly, on a construction of the Act, their Lordships are of opinion that, even if the security was taken in Malaysia, that was not contrary to section 3(1). In the second place, they are of opinion that the security was not taken in Malaysia, but in Singapore, where the charge was signed. All that was done at that stage in Malaysia was that the charge, after being duly executed in Singapore, was registered in the land register in Malaysia. That was an administrative procedure, the precise legal effect of which was not explored in argument, although Mr. Heyman submitted that, even if the charge was valid before registration, it was not enforceable until registered. Assuming that to be so, their Lordships do not consider that registration of the charge in order to make it enforceable can be considered as part of the transaction of making an advance to a customer. Consequently no part of the transaction was carried out in Malaysia. The loan was made in Singapore. The proper law applicable to the contract of loan was that of Singapore. The charge was executed there. There was no evidence that any money was remitted to Malaysia by the respondent. In these circumstances their Lordships are of opinion that the only place where the banking business of making a loan to a customer was transacted was in Singapore.

It was suggested that the enforcement of the security in Malaysia might be contrary to section 3(1) but it seems too plain for argument that the business of "making advances to customers" cannot by any reasonable process of interpretation be held to include enforcing the security against a guarantor.

Accordingly, their Lordships are of opinion that the first contention on behalf of the appellant fails.

The second contention was that the charge was created in contravention of section 9(1) of the Exchange Control Act 1953. That section provides:–

"9.(1) Except with the permission of the Controller, no person shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the scheduled territories."

Singapore was within the scheduled territories at the time when the loan, or at least the first instalment of the loan, was made. It ceased to be within the scheduled territories on May 8, 1973 – that is before the charge was executed on May 22, 1973. (It was common ground before the Board that these dates were correct, and it appears that the Federal Court must have been under a misapprehension when they said that Singapore ceased to be within the scheduled territories only in 1974). The contention which was developed in argument was that enforcement of the charge was an act preparatory to the making of a payment outside Malaysia, in respect that it was preparatory to compelling the appellant to pay off the loan to the respondent in Singapore. Their Lordships do not agree. There is no evidence that, if the security is enforced, the respondent will seek to obtain any payment outside Malaysia. It may be content to leave the proceeds of sale of the land in Malaysia. Their Lordships agree with the learned judge and with the Federal Court that the relevant provision of the Act in this case is paragraph 1 of the Fourth Schedule to the Act which provides:–

"1. Part III of this Act [which includes section 9] shall apply to sums required to be paid by any judgment or order of any court ... as they apply in relation to other sums, and it shall be implied in any judgment or order of any court in Malaysia ... that any sum required to be paid by the judgment, [or] order ... to which the said provisions apply shall not be paid except with the permission of the Controller."

As the appellant thus fails on the first two questions, it is not strictly necessary to consider the final question of what relief, if any, the appellant would have been entitled to if he had succeeded on either of the first two questions. But as the third question was dealt with by the trial judge, it is appropriate to mention it briefly now. When the matter was before the judge the appellant had applied for the charge to the discharged and the title of the land to be returned to him. In dealing with that application the learned judge said this:–

"But I should add that even if the [appellant] has established illegality on any of the grounds stated, I would find that he is not entitled to remedy, as his claim is founded on an illegal act, of which he was more to blame, as it was he who went to the bank outside the country."

Before this Board Mr. Heyman submitted that, if the appellant succeeded on either of the first two questions, he would be entitled at least to a declaration that the charge was illegal, void and unenforceable. As their Lordships understood it, Mr. Heyman would have been satisfied with such a declaration, as it would be enough to prevent the charge being enforced against the appellant. With the greatest respect to the learned trial judge, their Lordships are unable to agree with his view that, if the charge was illegal on either of the grounds considered above, the appellant was more to blame for that than the respondent. If the balance of culpability were to be relevant, they consider that the respondent was more culpable than the appellant, because the respondent was the only party who could have acted in breach of section 3 of the Banking Act or section 9(1) of the Exchange Control Act. Neither of these sections appears capable of applying to the appellant. Even if it be assumed that the parties were equally to blame, their Lordships would have considered it proper that at least a declaration to the effect mentioned above should have been granted.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Kingsford Dorman; Coward Chance.*